Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1022

In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF CALLING ATTENTION TO INTERVENING MATTER

Joseph Thomas Tokarz, II
Henrico County Public Schools
Post Office Box 23120
Richmond, Virginia 23223
(804) 226-3712

Counsel for Defendants/Petitioners

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 8

ADDITIONAL REASONS FOR GRANTING THE WRIT 10

I. The United States Department Of Education Has Issued A New Regulatory Interpretation Contrary To The Fourth Circuit's Decision. 10

A. The United States Department Of Education Has Ruled That There Is No Private School "Exception" To 34 C.F.R. §300.552 Despite The Fourth Circuit's Ruling To The Contrary. 10

B. The United States Department Of Education Has Ruled That The Education Of All Handicapped Children Act (EAHCA) Does Not Contain A "Subjective Intent" Component And That School Officials May Consider Placement Changes Prior To Revision Of A Handicapped Child's IEP. 12

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Case

Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986) 15

Federal Rules and Regulations

Rule 22.6 of the Rules of the Supreme Court of the United States of America 9

Rule 52(a) of the Federal Rules of Civil Procedure 13

34 C.F.R. § 300.347(b) 10

34 C.F.R. § 300.552 10, 11, 16

Lower Court Exhibits and Testimony

Joint Exhibit 127 14, 15

Hearing testimony at pages 247 and 144 of local due process hearing transcript 15

Federal Administrative Materials

Letter to The Honorable Thomas J. Bliley, Jr., United States House of Representatives, from Madeleine Will, Assistant Secretary for Special Education and Rehabilitative Services, United States Department of Education (January 26, 1989) 8, 9

Question 1 and response 15

Question 2 and response 16

Question 3 and response 15

Question 4 and response 11

Question 5 and response 14

Question 6 and response 16

No. 88-1022

In The
Supreme Court Of The United States

October Term, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG, and SUSAN SPIELBERG,

Plaintiffs/Respondents.

Second Supplemental Brief Calling Attention To Intervening Matter

REGULATORY PROVISIONS INVOLVED

Title 34 of the Code of Federal Regulations provides, in relevant part, as follows:

§ 300.342(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and
(2) Be implemented as soon as possible following the meetings under Reg. 300.343.
Comment - Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under Reg. 300.343.

§ 300.347(a)(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

§ 300.504(a) Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free

appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

§ 300.505(a) The notice under Reg. 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

§ 300.533(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;
(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

§ 300.552 Each public agency shall insure that:

(a) Each handicapped child's educational placement:
(1) Is determined at least annually,
(2) Is based on his or her individualized education program, and
(3) Is as close as possible to the child's home....

Appendix C to 34 C.F.R. Part 300 provides, in relevant part, as follows:

3. In requiring that an IEP be in effect before special education

and related services are provided, what does "be in effect" mean?

As used in the regulations, the term "be in effect" means that the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, where appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

5. **For a handicapped child receiving special education for the first time, when must an IEP be developed - before placement or after placement?**

An IEP must "be in effect <u>before</u> special education and related services are provided to a child." (§300.342(b)(1), emphasis added.) The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.

42. **When must IEP objectives be written - before placement or after placement?**

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

55. **Is it permissible for an agency to have the IEP completed when the IEP meeting begins?**

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(9) of the Act defines the IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and, whenever appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of

special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear the parents must be given the opportunity to be active participants in all major decisions affecting the education of their handicapped children. (See, e.g., S. Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47-50 (1975).)

59. **If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?**

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed - by either the

> parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

STATEMENT OF THE CASE

On December 16, 1988, Henrico officials filed their Petition for Writ of Certiorari and accompanying Appendix with the Clerk of this Court. On January 10, 1989, Henrico officials filed a Supplemental Brief to call the Court's attention to a relevant December 5, 1988 interpretation of the Virginia State Department of Education received too late to include in the Petition. On January 26, 1989, the United States Department of Education (the "Department") issued a specific interpretation of some of the

regulations at issue in this case in a letter to the Honorable Thomas J. Bliley, Jr., Third District Congressman from Virginia. This letter is reproduced in the Appendix at pages App. II,1-9.[1]

Because the letter states the Department's contrary view of two regulatory interpretations employed by the Fourth Circuit Court of Appeals, this Second Supplemental Brief respectfully directs the Court's attention to pertinent portions of the Department's letter. This Second Supplemental Brief is authorized by Rule 22.6 of the Rules of the Supreme Court of the United States of America.

---

[1] Because the Appendix to the Pettition used arabic page numbers and the Appendix to the first Supplemental Brief used Roman numerals for its page numbering, the Appendix to this Second Supplemental Brief numbers the pages as follows: App. II,#.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The United States Department Of Education Has Issued A New Regulatory Interpretation Contrary To The Fourth Circuit's Decision.

A. The United States Department Of Education Has Ruled That There Is No Private School "Exception" To 34 C.F.R. §300.552 Despite The Fourth Circuit's Ruling To The Contrary.

To reach its finding of a procedural violation by Henrico school officials, the Fourth Circuit created a private school "exception" to the "general rule" that "placement should be based on the IEP." App. 14, 11-12 (citations omitted). The private school "exception" was necessitated by the panel's inability to otherwise reconcile its erroneous reading of 34 C.F.R. §300.552 with the requirement of private school participation in IEP development found in 34 C.F.R. §300.347(b).

The panel took the illogical view that under 34 C.F.R. §300.552(a) "the placement decision can precede IEP development" in a case where the child will be educated in a private school but not when "the child will be educated in public facilities." App. 13 (citations omitted). Therefore, it said, "[s]ince Randolph is a public school, the general rule, not the exception, applies, and placement should have followed IEP development." App. 14.

In direct contrast, Question 4 of the Department's January 29, 1989 interpretation[2] flatly states that "there

---

2 The Department's interpretation does not vitiate or alter Henrico's attacks on the Fourth Circuit's "zero tolerance" and "mental processes" tests. Instead, it establishes an additional ground for reversal because it shows that the Fourth Circuit's opinion was based on still other erroneous views of the law.

is no private school exception to the least restrictive environment or IEP requirements." App. II,6-7. Since the private school "exception" was a necessary element in the Fourth Circuit's opinion, the opinion should be reversed because of the Fourth Circuit's misunderstanding of the EAHCA regulatory scheme.

B. The United States Department Of Education Has Ruled That The Education Of All Handicapped Children Act (EAHCA) Does Not Contain A "Subjective Intent" Component And That School Officials May Consider Placement Changes Prior To Revision Of A Handicapped Child's IEP.

Also important to the Fourth Circuit's decision was the district court's finding that "the defendants resolved to place Jonathan in a daily program prior to the development of his annual IEP." App. 11, 14, 53 (emphasis added). Henrico has consistently

contended that this finding was based upon an erroneous view of the Act.[3]

Since there was no testimony, "resolution" or document stating that Henrico had made a placement decision before the IEP meeting, the district court's finding amounted to the application of a "mental processes" or "subjective intent" test by the district court.

Under this test, the district court purported to read the minds of school officials prior to their IEP meetings with the Spielbergs to determine that

---

[3] Despite the School Board's allocation of 30% of its Fourth Circuit reply brief to contest this finding of the district court as "clearly erroneous," the Fourth Circuit did not conduct any analysis of the district court's basis for its finding. Instead, the panel took the district court's finding as a "given" without the appellate review contemplated by F.R.C.P. Rule 52(a).

they had "resolved" to make a placement change regardless of what happened in those meetings. To make its finding, the district court had to improperly ignore repeated written assurances to the Spielbergs that school officials would not make their placement decision until the IEP had been drafted as well as their testimony expressly denying that a placement decision had been made before the IEP meeting.[4] Joint Exhibit 127; Due process hearing testimony at 247, 144.

---

[4] For this reason, Question 5 of the Department's interpretation does not apply to the facts of this case. App. II, 7-8. Henrico's September 13, 1985 notice of its proposal to change Jonathan's placement did not take the position that the placement proposed on September 13, 1985 would automatically be implemented following pro forma revision of Jonathan's IEP. Joint Exhibit 127. Instead, it invited the Spielbergs to provide outside evaluations at Henrico's expense, promised that any information (cont'd.)

Furthermore, not only was the district court's finding simply wrong on the facts, it was erroneous as a matter of law. While somewhat indirect, the Department's interpretation indicates there is no "subjective intent" test under EAHCA.

When asked in Question 3 if the Act contains a "subjective intent" component, the Department's response refers the reader to the responses to Questions 1

---

[4] (cont'd.) submitted would be considered by the eligibility and IEP committees, and expressly stated that "the placement decision will not be made until an IEP has been developed on October 15, 1985." The notice also stated that a placement other than that proposed "may ultimately be chosen." Joint Exhibit 127.

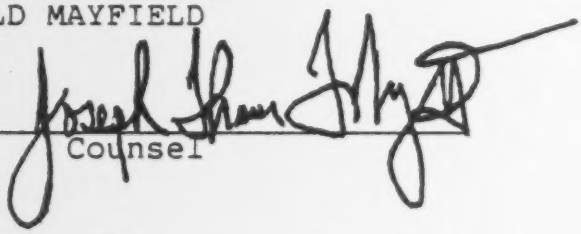
Under these circumstances, the notice did not violate the Act. See Jackson v. Franklin County School Board, 806 F.2d 623, 628-29 (5th Cir. 1986) (school officials violated EAHCA because they did not send a prior written notice proposing a change in placement and then convene an IEP meeting to discuss a placement change).

and 2. App. II,5-6. Question 2 asked whether 34 C.F.R. §300.552(a)(2) prohibits "local education agency consideration of a change in educational placement prior to revision of a handicapped child's IEP." App. II,3. Interestingly, the response to Question 6 provides the direct answer: "The answer to question 2 was no." App. II,9. The response to Question 2 amplified this answer by affirming that the "possible need for a change in placement could be considered prior to revision of the IEP." App. II,3.

Therefore, the Department's position is that school officials may consider placement changes prior to IEP meetings and that the process of considering alternatives does not violate the Act. The district court's resort to what it felt school officials "resolved" shows

that it confused permissible consideration of educational alternatives with supposedly impermissible decision-making. Thus, the finding of the district court, and by extension that of the Fourth Circuit, was based upon a misunderstanding of the regulations and should be reversed.

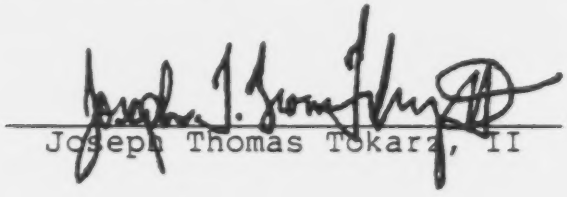
HENRICO COUNTY PUBLIC SCHOOLS
MALCOLM M. CHRISTIAN
WILLIAM C. BOSHER, JR.
MORTON BRADMAN
JOANN MARCHANT
GWENDOLYN WHITING
DOROTHY SUGARMAN
DONALD MAYFIELD

By 
Counsel

Joseph Thomas Tokarz, II
Henrico County Public Schools
P. O. Box 23120
Richmond, VA 23223
(804)226-3712

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1989, a true and accurate copy of the foregoing Second Supplemental Brief Calling Attention To Intervening Matter has been hand-delivered to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Joseph Thomas Tokarz, II

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND
REHABILITATIVE SERVICES

January 26, 1989

Honorable Thomas J. Bliley, Jr.
House of Representatives
213 Cannon Office Building
Washington, D.C. 20515

Dear Congressman Bliley:

Thank you for your letter to Dr. G. Thomas Bellamy concerning the application of certain regulations for Part B of the Education of the Handicapped Act (EHA-B). You posed a number of specific questions concerning the rules under 34 CFR §§300.504(a)(1), 300.552(a)(2) and 300.347. Your questions and our responses follow.

Question (1): Does 34 CFR §300.552(a)(2) require that no

decisions be made about placement before an IEP is prepared or revised, or does it merely require that the subsequent actual delivery of special education and related services be based upon the requirements of the IEP?

Response: Both are true. Note that §300.342(b)(1) requires that an IEP must be in effect before special education and related services can be provided. In addition, all placement decisions must be made on an individual basis and only after a valid IEP has been completed for each child.

Question (2): If the answer to question (1) is that 34 CFR §300.552(a)(2) prohibits decisions about placement before an IEP is prepared or revised, does 34 CFR §300.552(a)(2) prohibit local education agency consideration of a change of educational placement prior to revision of a handicapped child's IEP?

Response: The possible need for a change in placement could be considered prior to revision of the IEP, while the specific placement decision is determined after the IEP is reviewed and, if appropriate, revised. Under EHA-B regulations, IEP goals and

objectives must be written before a placement. 34 CFR Part 300, Appendix C, Question 42. See also Appendix C, Questions 3 and 5 and the recently-decided case of Spielberg v. Henrico County Public Schools, 853 F 2d 256 (4th Cir. 1988), EHLR DEC. 441:178; Note also that Appendix C specifically states that "[i]t is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents .... It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels

of education, and a recommendation regarding annual goals, short-term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents."

34 CFR Part 300, Appendix C, Question 55.

Question (3): Does the EAHCA contain a "subjective intent" component: i.e., are the parents' procedural rights

violated if school officials have strong opinions about an appropriate placement but agree to defer a placement decision until after revision of a handicapped child's IEP?

Response: The responses to questions 1 and 2 apply.

Question (4): Is there a "private school" exception to 34 CFR §300.552(a) so that the answers to the preceding questions would be different if a private school is the current placement or if it is a potential placement?

Response: No. There is no private school exception to

the least restrictive environment or IEP requirements. Private school representatives may attend an IEP meeting when private school placement is merely under consideration. See 34 CFR Part 300, Appendix C, Question 59, which provides guidance for compliance with the requirements of 34 CFR §300.347.

Question (5): May school officials legally send a written notice complying with the requirements of 34 CFR §300.505, if the notice proposes a change in placement before development of a revised IEP, and if the notice

specifically states the actual placement decision will be made following revision of the IEP?

Response: If you are asking if a notice proposing a change in placement can be issued before the revision of the IEP, with the actual implementation of that proposed change in placement coming after that review, the answer is, "No." See 34 CFR §§300.533(b), 300.552(a)(2) and 300.342(b)(1) and Appendix C, 34 CFR Part 300, Question 55.

Question (6): If the answer to question (2) is yes, how

can school officials invite representatives of a private school to attend an IEP meeting as required by 34 CFR §300.347 without violating 34 CFR §300.552(a)(2)?

Response: The answer to question (2) was no. Therefore, there is no conflict between these two sections. In addition, you should note the response to question 4 and the discussion in 34 CFR Part 300, Appendix C at Question 59 which explores this subject.

We appreciate your interest and we hope you find our responses helpful. Let me

know if we can be of any further assistance.

Sincerely,

[signed]

Madeleine Will
Assistant Secretary